

REPLY TO OFFICE ACTION
Application Serial No. 10/734,238
Attorney Docket No. 02734.0496-07000

REMARKS

Claims 16-67 are now pending in this application and stand rejected in the non-final Office Action dated February 22, 2005 ("Office Action"). Applicants appreciate the Office's consideration of the Information Disclosure Statement submitted on March 30, 2004, and the return of a signed Form PTO-1449. With this Reply Applicants do not present any claim amendments but do offer the following remarks and arguments concerning the patentability of the pending claims.

Amendments to the Specification

Applicants have amended the specification to reflect the issuance of a patent based upon one of the applications to which this application claims priority. Applicants have also corrected two minor grammatical errors concerning the word "of." No new matter is added with these amendments and Applicants respectfully request that they be entered without objection.

The Office's Summary of Base Claims

The Office has provided a summary of independent claims 16 and 42, as well as the terms "inside surface laminate," "bottom panel member," and "paper-based." See Office Action at 2-3. Applicants appreciate the Office sharing its interpretation of the pending claims and do not necessarily disagree with the Office's interpretation. However, Applicants neither adopt nor endorse the Office's summary to the extent that it changes the language of the claims themselves, which should control the examination of this application. Applicants offer the following remarks to clarify the record and

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highlight the following portions of the summary that are believed to narrow certain claim language in spite of the terms' ordinary meaning in light of their use in the specification.

As to both claims 16 and 42, the Office's summary indicates that the recitation of "a first polyethylene admixture" is interpreted as "a polyethylene-containing mixture." See *id.* While Applicants agree with this interpretation to the extent that it acknowledges that a first polyethylene admixture contains one or more polyethylenes, the Office's interpretation should not exclude the inclusion of different polyethylenes or polyethylene admixtures, as are recited in at least claim 23, for example. In addition, the Office's summary omits the word "effective" from its interpretations of the first polyethylene admixture's influence both on preventing penetration of liquid into the paper and on forming a liquid tight seal between the body member and the bottom panel member. As is clearly indicated throughout the specification, the inside surface of a first polyethylene admixture, either alone or through its interactions with other components of a container, is effective to prevent penetration of liquid into the paper during use and is effective to form a liquid tight seal between the body member and the bottom panel member. See, e.g., page 5, lines 21-26; page 6, lines 6-8; page 9, lines 5-20. Applicants submit that a first polyethylene admixture need not by itself prevent penetration or form a liquid tight seal, and the language of claims 16 and 41 does not exclude this interpretation from its scope.

The Office's summary also indicates that claim 42's recitation of "a laminate that is foamable under fabrication conditions" is interpreted as "a laminate that foams during fabrication." See Office Action at 3. Applicants disagree with this summary only to the extent that it changes the definitions supported by the claim language as described in

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the specification. For instance, perhaps contrary to the Office's summary, the recited laminate that is foamable under fabrication conditions does not necessarily foam during fabrication. Conditions must be appropriate for foaming; moreover, a foamable laminate may only partially foam or may be treated, altered, or covered to cause more or less foaming. See, e.g., page 12, lines 24-26. Of course, the laminate may indeed foam completely, as could also be implied by the Office's summary of claim 42. Applicants highlight these possibilities as merely exemplary of the claim scope and stand behind the language of the claim as supported in the specification.

The Office also interprets three of the claim terms: "inside surface laminate," "bottom panel member," and "paper-based." See Office Action at 3. Applicants agrees with those interpretations to the extent that they are consistent with the ordinary meanings of those terms in light of their usage in the specification.

The above comments respond only to certain portions of the Office's summary that Applicants specifically wish to clarify for the continued examination of this application. Applicants neither adopt nor endorse those additional portions of the Office's summary not discussed above and instead continue to rely on the claim language itself. Should the Office disagree with any of Applicants' remarks concerning the summary, the Office is respectfully requested to contact the undersigned.

Rejection Under 35 U.S.C. § 103(a)

The Office rejected claims 16-67 under 35 U.S.C. § 103(a) as obvious over U.S. Patent No. 3,445,892 to Amberg et al. in light of the alleged admitted prior art on page 2 of the specification. See Office Action at page 4. The Examiner believes that Amberg

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et al. teaches a paper container with an inside surface coated with polyethylene/polypropylene laminates, relying on the alleged prior art for a foamable outer surface. To assert a *prima facie* case of obviousness, the Office must show that the cited references provide to one of ordinary skill in the art some suggestion or motivation to combine or modify those teachings in an effort to achieve all of the limitations of the claimed invention, with a reasonable expectation of success. See MPEP § 2143. Applicants submit that the combination of Amberg et al. and the alleged admitted prior art does not meet this test and, therefore, respectfully traverse this rejection.

Amberg et al. teaches "the provision of full, unseamed plastic liners" in receptacles or containers made of paper. Col. 1, lines 29-34. The bottom closure of the container "is adhesively secured in place" or "secured only to the interior wall of the body by annularly spaced apart spots of adhesive." Col 2, lines 53-58. The adhesive may be a standard glue-type adhesive. See col. 6, lines 69-76. The plastic liner is drawn into the container through the unglued portions or holes in the adhesive such that it is "brought tightly against the joint" of the container formed by the bottom closure and the interior wall. See Figure 3; col. 6, line 69 to col. 7, line 17; col. 14, lines 3-11. This configuration indicates that the bottom closure and the body of the container are not secured or sealed together by the plastic lining; instead, the plastic lining merely covers and protects the porous joint of the body and bottom closure from the contents of the container, with the standard adhesive providing the partial seal.

Independent claims 16 and 41 both recite the presence of a first polyethylene admixture on the inside surface of a body member effective to form a liquid tight seal between the body member and a bottom panel member. Amberg et al. does not teach

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or suggest that its plastic liner is effective to form a liquid tight seal between the body member and bottom closure of its containers. Quite differently, that plastic liner merely covers and abuts a porous joint formed between the body member and the bottom panel member, and that joint is separately sealed by standard adhesive, such as glue. Because a vacuum is able to pull a plastic liner through the holes in the adhesive, Applicants also submit that glue-type seal between the bottom closure and the body member is not itself liquid tight. The plastic liner is required to prevent liquid from seeping through the covered, porous joint. See, e.g., col. 2, lines 3-8 and 24-31.

Amberg et al. simply does not teach or suggest at least the presently claimed use of a first polyethylene admixture. The Office has not provided any evidence that the skilled artisan would have been motivated to modify the teachings of Amberg et al. to include such a use of a first polyethylene admixture in an attempt to achieve the claimed invention. In fact, a modification for the use of a first polyethylene admixture to form a liquid tight seal between a body member and a bottom closure of the container of Amberg et al. may render that reference's teachings unsatisfactory for their intended purpose, as it could interfere with the ability to draw a vacuum through the container and apply the plastic liner. See MPEP § 2143.02. Finally, nothing in Amberg et al. would have provided the skilled artisan with a reasonable expectation of success in making the any modification to include the claimed use of a first polyethylene admixture. Thus, Applicants submit that Amberg et al. cannot form the basis for a rejection under 35 U.S.C. § 103(a) as it fails each of the three requirements for a *prima facie* case of obviousness; therefore, Applicants respectfully request that this obviousness rejection of claims 41-67 be withdrawn.

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Double Patenting Rejections

In the sections that follow, Applicants respond to each of the Office's rejections under the judicially created doctrine of obviousness-type double patenting. With respect to the six (6) rejections based on U.S. Patent Nos. 6,129,653, 6,482,481, 6,565,934, 6,675,586, 6,663,927, and 6,703,090, Applicants respectfully request that the Office hold these rejections in abeyance until the indication of otherwise allowable subject matter. Upon review of the remarks and arguments made in this Reply, should the Office believe this application to be in condition for allowance but for those double patenting rejections held in abeyance, Applicants strongly and respectfully request that the Office contact the undersigned attorney to discuss an appropriate resolution.

U.S. Patent No. 6,129,653. The Office rejected claims 42-67 under the judicially created doctrine of obviousness-type double patenting over claims 1-20 of U.S. Patent No. 6,129,653. Applicants respectfully request that the Office hold this rejection in abeyance until the indication of otherwise allowable subject matter.

U.S. Patent No. 6,482,481. The Office rejected claims 16-67 under the judicially created doctrine of obviousness-type double patenting over claims 1-21 of U.S. Patent No. 6,482,481. Applicants respectfully request that the Office hold this rejection in abeyance until the indication of otherwise allowable subject matter.

U.S. Patent No. 6,565,934. The Office rejected claims 16-67 under the judicially created doctrine of obviousness-type double patenting over claims 1-5 of U.S. Patent No. 6,565,934. Applicants respectfully request that the Office hold this rejection in abeyance until the indication of otherwise allowable subject matter.

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U.S. Patent No. 6,675,586. The Office rejected claims 16-67 under the judicially created doctrine of obviousness-type double patenting over claims 1-15 of U.S. Patent No. 6,675,586. Applicants respectfully request that the Office hold this rejection in abeyance until the indication of otherwise allowable subject matter.

U.S. Patent No. 6,142,331. The Office rejected claims 16-67 under the judicially created doctrine of obviousness-type double patenting over claims 1-8 of U.S. Patent No. 6,142,331 ("the '331 patent")¹ in view of Amberg et al. Specifically, the rejection states that the it "would have been obvious to one having ordinary skill in the art at the time of the invention to employ the inner laminate layer of Amberg on the cups of the '331 claims in order to help prevent leaks." Office Action at 8. Thus, the Office recognizes that the claims of the '331 patent do not recite a heat-insulating paper container having an inside surface laminate, and relies on Amberg et al. for the premise that the addition of an inside surface laminate would have been obvious to one of ordinary skill. *Id.* Applicants respectfully traverse this rejection.

According to MPEP § 804(I), an obviousness-type double patenting rejection employs similar guidelines as a statutory obviousness rejection under 35 U.S.C. § 103, except that only the claims themselves are analyzed and the disclosure of the cited patent or application may not be used as the basis of the rejection. Because the '331 patent issued before the instant application was filed, the "one-way" test of obviousness is used to determine "whether the invention defined in a claim in the application is an

¹ Applicants note that the instant application claims priority under 35 U.S.C. § 120 to an application filed June 6, 1997. The '331 patent issued on November 7, 2000, from an application filed on October 6, 1999. Thus, Applicants submit that the '331 patent is not prior art to this application under any of 35 U.S.C. §§ 102(a), (b), and (e).

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obvious variation of the invention defined in a claim" in the '773 patent. See MPEP § 804(I)(a) (*citing In re Berg*, 46 U.S.P.Q.2d 1226 (Fed. Cir. 1998)). Applicants assert that the proper application of this test, in light of the established general principles for obviousness, reveals that the claims 16-67 of this application are not obvious over claims 1-8 of the '331 patent in view of Amberg et al.

Independent claim 16 of this application recites a heat-insulating paper container fabricated from a body member having an inside surface laminate of a first polyethylene admixture effective to prevent penetration of liquid into the paper during use, wherein the first polyethylene admixture is effective to form a liquid tight seal between the body member and a bottom panel member. Independent claim 41 of this application recites a method for fabricating a heat-insulating paper container comprising applying to the inside surface of a body member a first polyethylene admixture effective to prevent penetration of liquid into the paper during use, wherein the first polyethylene admixture comprises a material effective to form a liquid tight seal between the body member and a bottom panel member.

Quite differently, claims 1-8 of the '331 patent are directed to a heat-insulating container comprising, in part, an uppermost region of a body member being curled to form a circumferentially extending brim, with a first circumferential portion of the brim being bonded to an outside surface laminate of foamed polyethylene and a second circumferential portion of the brim being unbonded to the outside surface laminate.

Under the one-way test for obviousness from *In re Berg*, the invention of the present claims must be an obvious variation of the invention of the claims in the '331 patent, in view of Amberg et al., to uphold a proper obviousness-type double patenting

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rejection. Therefore, the appropriate question is: Do the claims of the '331 patent render the pending claims obvious? Or, to rephrase, are the pending claims an obvious variant of the '331 claims? Of course, to assert a *prima facie* case of obviousness, the Office must show that the cited references (i.e., the claims of the '331 patent in view of Amberg et al.) provide to one of ordinary skill in the art some suggestion or motivation to combine or modify those teachings in an effort to achieve all of the limitations of the claimed invention, with a reasonable expectation of success. See MPEP § 2143. Applicants assert that these tests are not satisfied by the cited references and that there is no obviousness-type double patenting of the pending claims in this case.

Claims 16 and 41 of this application recite, in part, an inside surface of a body member with a first polyethylene admixture effective to form a liquid tight seal between the body member and a bottom panel member. On the other hand, claims 1-8 of the '331 patent recite, in part, a body panel member having an outside surface laminate of foamed polyethylene that is either bonded or not bonded at certain circumferential portions to an uppermost curled region of a body member. Applicants believe that one of ordinary skill would certainly not find the currently claimed inside surface of a first polyethylene admixture to be an obvious variation of the outside surface laminate of foamed polyethylene recited in the '331 patent. In fact, the claims of the '331 patent do not disclose or suggest the composition of the inside surface of a body member at all, and certainly do not disclose or suggest the use of an inside surface of a first polyethylene admixture that is either (1) effective to prevent penetration of liquid into paper during use, or (2) effective to form a liquid tight seal between a body member and a bottom panel member.

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Amberg et al. does not remedy the deficiencies of the '331 patent claims. As noted above, Amberg et al. fails to teach or suggest the claimed use of a first polyethylene admixture and also fails to teach or suggest that its plastic liner or film would be effective to form a liquid tight seal between a body member and a bottom panel member. The reference actually relies upon spaced-apart spots of a standard glue-type adhesive to secure its paper body and bottom closure. See col. 6, lines 69-76. Moreover, the plastic liner, which is drawn into the container by a vacuum through the holes in the joint between the paper body and the bottom closure, merely abuts the joint between the bottom closure and the paper body and does not actually form a seal between the bottom closure and the paper body. See Figure 3; col. 6, line 69 to col. 7, line 17; col. 14, lines 3-11. Amberg et al. simply does not add any teaching to assist in proving a *prima facie* case of obviousness along with the claims of the '331 patent.

The claims of the '331 patent and Amberg et al. do not teach or suggest each and every element of the pending claims. Whatever motivation a skilled artisan may have to combine the claims of the '331 patent with Amberg et al., that combination would not result in the presently claimed invention because it would lack an inside surface of first polyethylene admixture that is effective to prevent penetration of liquid into paper during use and to form a liquid tight seal between a body member and a bottom panel member. Thus, one of ordinary skill would have no reasonable expectation of success in making the Office's proposed combination.

For at least the reasons presented above, a comparison of the claims of the '331 patent, in view of Amberg et al., to the pending claims of this application fails the *In re Berg* test for one-way obviousness. Under the established general principles for a

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prima facie case of obviousness, and properly considering only the claims of the '331 patent and not its specification, a skilled artisan would not find the pending claims of this application to be an obvious variation of those of the '331 patent. As such, there can be no obviousness-type double patenting of the pending claims over the '331 patent, even in view of Amberg et al. Applicants respectfully request that this rejection be withdrawn.

U.S. Patent No. 6,663,927. The Office rejected claims 16-67 under the judicially created doctrine of obviousness-type double patenting over claims 1-5 of U.S. Patent No. 6,663,927 in view of Amberg et al. Applicants respectfully request that the Office hold this rejection in abeyance until the indication of otherwise allowable subject matter.

U.S. Patent No. 6,703,090. The Office rejected claims 16-67 under the judicially created doctrine of obviousness-type double patenting over claims 1-2 of U.S. Patent No. 6,703,090 in view of the alleged admitted prior art on page 2 of the instant specification. Applicants respectfully request that the Office hold this rejection in abeyance until the indication of otherwise allowable subject matter.

U.S. Patent No. 5,766,709. The Office rejected claims 16-67 under the judicially created doctrine of obviousness-type double patenting over claims 1-11 of U.S. Patent No. 5,766,709 ("the '709 patent")² in view of the alleged admitted prior art on page 2 of the instant specification. Specifically, the Office alleges that it "would have been obvious to one having ordinary skill in the art at the time of the invention to employ the inner surface layer of the specification on the stock materials of the '476 claims in order

² As noted in footnote 1, the instant application has a priority date under 35 U.S.C. § 120 of June 6, 1997. The '709 patent issued on June 16, 1988, from an original application filed on February 23, 1996. Therefore, the '709 patent is not prior art under 35 U.S.C. § 102(b) but may be prior art under at least 35 U.S.C. § 102(e). The Office has not made any prior art rejections based on the disclosure of the '709 patent and Applicants do not believe that any such rejection would be proper.

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to help make them leakproof and to make cups therefrom." Office Action at 11-12. Thus, the Office recognizes that the claims of the '709 patent do not recite a heat-insulating paper container having an inside surface laminate, and relies on the specification's alleged admitted prior art for the premise that the addition of an inside surface laminate would have been obvious to one of ordinary skill. *Id.* Applicants respectfully traverse this rejection.

Applicants have already discussed in detail the standards for an obviousness-type double patenting rejection in regards to the rejection over the '331 patent claims. Applicants submit that the same standards, including the one-way test for obviousness from *In re Berg*, apply to this rejection over the '709 patent claims. As such, the question becomes: are the currently pending claims of this application an obvious variation of the claims of the '709 patent, in view of the alleged admitted prior art?

Applicants believe that the answer to this question must be in the negative. Independent claim 1 of the '709 patent recites a container body with at least one side wall including a base layer with an insulating layer on at least a portion of the base layer. On the other hand, independent claims 16 and 41 of this application recite an inside surface of a body member with a first polyethylene admixture effective to form a liquid tight seal between the body member and a bottom panel member. Applicants believe that one of ordinary skill would not find the currently claimed inside surface of a first polyethylene admixture to be an obvious variation of the base layer structure recited in the claims of the '709 patent, even in light of the alleged admitted prior art.

In fact, the claims of the '709 patent do not teach or suggest the composition of the inside surface of a body member at all, and certainly do not teach or suggest the

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use of an inside surface of a first polyethylene admixture that is either (1) effective to prevent penetration of liquid into paper during use, or (2) effective to form a liquid tight seal between a body member and a bottom panel member. And the alleged admitted prior art on page 2 of the specification does not remedy these deficiencies. That alleged admitted prior art, as discussed on page 10 of the Office Action, does not teach or suggest a first polyethylene admixture effective to form a liquid tight seal between an body member and a bottom panel member of a heat-insulating paper container. And the Office does not even allege that it teaches or suggests that claim element.

Thus, the combination of the claims of the '709 patent with the alleged admitted prior art does not teach or suggest each and every element of the pending claims. Whatever motivation a skilled artisan may have to combine the claims of the '709 patent with the alleged prior art, that combination would not result in the presently claimed invention because it would lack an inside surface of a first polyethylene admixture that is effective to prevent penetration of liquid into paper during use and to form a liquid tight seal between a body member and a bottom panel member. One of ordinary skill would also have no reasonable expectation of success in making the Office's proposed combination. As such, Applicants submit that the pending claims of this application do not constitute obviousness-type double patenting over the claims of the '709 patent, in view of the alleged admitted prior art, and thus Applicants respectfully request that the Office withdraw this rejection.

U.S. Patent No. 6,030,476. The Office rejected claims 42-67 under the judicially created doctrine of obviousness-type double patenting over claims 1-6 of U.S. Patent

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No. 6,030,476 ("the '476 patent")³ in view of the alleged admitted prior art on page 2 of the instant specification. The Office uses the claims of the '476 patent, in combination with the alleged prior art, in a similar fashion to the way the claims of the '709 patent were used for pending claims 16-67. Applicants respectfully traverse this rejection.

Applicants have already discussed in detail the standards of an obviousness-type double patenting rejection in regards to the rejections over the claims of the '331 and the '709 patents. Applicants submit that the same standards, including the one-way test for obviousness from *In re Berg*, apply to this rejection over the '476 patent claims. As such, the question is: are the currently pending claims of this application an obvious variation of the claims of the '476 patent, in light of the alleged admitted prior art?

Once again, Applicants submit that the answer to this question must be in the negative. Independent claim 1 of the '476 patent recites a method of forming an insulated composite stock material comprising, in part, applying a thermoplastic synthetic resin film to at least a portion of a surface of a base layer and heat treating the base layer such that the resin expands to form an insulating layer. On the other hand, independent claims 16 and 41 of this application recite a heat-insulating paper container with an inside surface of a body member comprising a first polyethylene admixture effective to form a liquid tight seal between the body member and a bottom panel member. Applicants believe that one of ordinary skill would not find the currently claimed inside surface of a first polyethylene admixture to be an obvious variation of the

³ The '476 patent issued on February 29, 2000, and is a divisional of the '709 patent that has a priority date of February 23, 1996. Therefore, the '476 patent is not prior art under 35 U.S.C. § 102(b) but may be prior art under at least 35 U.S.C. § 102(e). The Office has not made any prior art rejections based on the disclosure of the '476 patent and Applicants do not believe that any such rejection would be proper.

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stock materials' base layer structure recited in the '476 patent claims, even in view of the alleged admitted prior art.

The claims of the '476 patent do not teach or suggest the composition of an inside surface of a body member at all, and certainly do not teach or suggest the use of an inside surface of a first polyethylene admixture that is either (1) effective to prevent penetration of liquid into paper during use, or (2) effective to form a liquid tight seal between a body member and a bottom panel member. In fact, the '476 patent claims do not recite or suggest anything regarding the penetration of liquid into the base layer. Furthermore, claim 5 of the '476 patent neither teaches nor suggests anything regarding formation of a seal between the at least one side wall and the bottom wall.

The alleged admitted prior art on page 2 of the specification does not remedy these deficiencies. That alleged admitted prior art, as discussed above in regards to the obviousness-type double patenting rejection over the claims of the '709 patent and also on page 10 of the Office Action, does not teach or suggest a first polyethylene admixture effective to form a liquid tight seal between an body member and a bottom panel member of a heat-insulating paper container. And the Office does not even allege that it teaches or suggests that claim element. Thus, the combination of the '476 patent claims with the alleged admitted prior art does not teach or suggest every element of the pending claims.

Whatever motivation a skilled artisan may have to combine the claims of the '476 patent with the alleged prior art, that combination would not result in the presently claimed invention because it would lack an inside surface of a first polyethylene admixture that is effective to prevent penetration of liquid into paper during use and to

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form a liquid tight seal between a body member and a bottom panel member. One of ordinary skill would also have no reasonable expectation of success in making the Office's proposed combination. As such, Applicants submit that the pending claims of this application do not constitute obviousness-type double patenting over the claims of the '476 patent, even in view of the alleged admitted prior art, and thus respectfully request that the Office withdraw this rejection.

Conclusion

In view of the foregoing amendments and remarks, Applicants respectfully request the reconsideration and the continued examination of this application and the timely allowance of the pending claims. Should the Office wish to discuss any of the remarks made in this Reply, or wish to discuss the obviousness-type double patenting rejections requested to be held in abeyance, Applicants respectfully request that the Office contact the undersigned attorney.

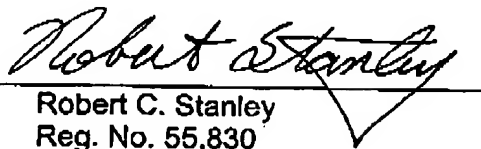
Please grant any extensions of time required to enter this response and charge any additional required fees to our deposit account 06-0916.

Respectfully submitted,

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Dated: May 23, 2005

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